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NO. 92-343

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES BURKE SANTOS, Petitioner

V.

MEGUMI LINDSTROM AND UNIFICATION CHURCH OF COLORADO, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

APPENDIX II

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FLATIRON PAVING CO. OF BOULDER, a Colorado corporation, Plaintiff-Appellee,

v.

GREAT SOUTHWEST FIRE INSURANCE COMPANY, an Arizona corporation, Defendant-Appellant.

No. 89CA1152

Colorado Court of Appeals, Div V.

Oct. 25, 1990.

Rehearing Denied Dec. 6, 1990.

Certiorari Denied June 17, 1991.

General contractor which was assigned moving subcontractor's rights under a contractor's liability policy filed action against insurer to recover for property damage caused by moving subcontractor during relocation of state historical monument. The District Court, Boulder County, Morris Sandstead, J., entered summary judgment against insurer, and insurer appealed. The Court of

Appeals, Van Cise, J. held that: (1) action was timely; (2) insurer waived right to receive timely notice of pendency of underlying action when it denied liability on the basis of coverage; and (3) exclusion provisions of policy were ambiguous and thus has to be construed to provide coverage.

Affirmed.

1. Limitation of Actions 46(6)

Insured's assignee's cause of action against contractor's liability insurer for failure to indemnify did not accrue until entry of judgment against insured from whom assignee was unable to collect judgment.

2. Insurance 619

Special statute of limitations applicable to actions against persons engaged in construction of improvements to real property, which

did not specifically refer to movers, did not apply to indemnity action to recover from insurer for contractor who agreed to move state historical monument as part of highway paving project, particularly since moving was not an improvement to real property. West's C.R.S.A. § 13-80-104.

3. **Insurance 559(2)**

Contractor's liability insurer waived its right to assert its lack of timely notice of pendency of underlying action as a defense after it denied liability on the basis of coverage when notified by insured ten days after incident occurred, insured did not assert notice defense until after judgment was entered against its insured and action was instituted by insured's assignee.

4.Insurance 435.24(1)

"Care custody or control" and "collapse hazard" exclusions under contractor's liability policy, which called for exclusions of coverage for property damage resulting from moving contractor's work, were in consistent with policy provisions eliminating exclusion for property damage resulting from work in progress that was warranted to be done in a workmanlike manner, an thus provisions were ambiguous and had be construed in favor of insured.

Hutchinson, Black, Hill & Cook, James M. England, Boulder, for plaintiff-appellee

Walberg, Dagner & Lloyd, P.C., Wendelyn K. Walberg, Englewood, for defendant

appellant.

Opinion by JUDGE VANCISE.*

Defendant, Great Southwest Fire Insurance Company (Southwest), appeals a summary judgment entered against it and in favor of plaintiff, Flatiron Paving Co. of Boulder (Flatiron). We affirm.

In early 1983, Flatiron hired Whitlock House Moving, Inc., (Whitlock) to move a state historical monument as part of Flatiron's highway paving contract with the State. In April, during the final stages of excavating under the base of the monument, it collapsed and had to be rebuilt by Flatiron at a cost of approximately $26,000. At the time of the collapse, Whitlock was the insured in a contractor's liability policy with Southwest.

On April 28, Whitlock notified Southwest that the monument had been damaged. On May 2, Southwest wrote Whitlock, acknowledging it had received notice of the loss, and stating that Southwest "will not be able to help you with this claim" on the basis that:

> "This insurance does not apply ... to property damage to ... property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control... ."

On October 4, Flatiron furnished Southwest with the rebuilding costs and advised it would sue if not reimbursed within ten days. A similar letter was sent to Whitlock on the 19th with a copy to Southwest. On November 10, Flatiron filed its complaint against Whitlock.

In November 1984, a default judgment was entered in favor of Flatiron against Whitlock in the amount of $26,365.66, plus interest, costs, and attorney fees. Whitlock then assigned to Flatiron all rights under its liability policy, in exchange for Flatiron's agreement not to execute against Whitlock on its judgment. About eleven months later, Flatiron informed Southwest of the judgment and of assignment of Whitlock's claims. In December 1985, Southwest wrote Flatiron, denying policy coverage and referring to the policy exclusion for damage to property in the insured's "care, custody or control."

On May 14, 1987, Flatiron commenced this action seeking recovery from Southwest for the property damage caused by Whitlock. Its claims were based on (1)

Whitlock's assignment of its rights under the policy (including the right to recover from Southwest for the alleged breach of its contractual obligation to indemnify its insured), (2) Flatiron's status as an intended third-party beneficiary of the insurance contract, and (3) Southwest's allegedly negligent misrepresentations to Flatiron concerning the nature of Whitlock's coverage.

Prior to trial, the court denied Southwest's motion for summary judgment in which Southwest asserted that Flatiron's first two claims were barred by applicable statutes of limitations. The court granted Flatiron's motion for summary judgment on its first two claims on the grounds (1) that Southwest was bound by the prior judgment obtained by Flatiron against its insured, Whitlock,

following Southwest's refusal to defend and (2) that Southwest's policy provided coverage for the factual claims underlying that judgment as a matter of law.

On Flatiron's motion, the third claim was dismissed, with leave to be reinstated in the event of remand after appeal. Judgment was then entered in Flatiron's favor on the first two claims. This appeal followed.

[1] Southwest initially contends that Flatiron failed to file its claims within the three-year period specified in § 13-80-107, C.R.S. (revised and recodified at § 13-80-101(1)(a), C.R.S. (1987 Repl.Vol. 6A)) and that, therefore, the claims should be dismissed. Flatiron asserts that the action is governed by the provisions of the six-year statute, § 13-80-110,

C.R.S.; cf. § 13-80-103.5, C.R.S. (1987 Repl.Vol. 6A), and was, therefore, filed in time. We conclude the claim was timely filed.

Generally, before a statute of limitations begins to run, there must be some damage which would entitle a plaintiff to maintain a cause of action. *Doyle v. Linn,* 37 Colo. pp. 214, 547 P.2d 257 (1975). The procedure to be utilized in determining when a use of action accrues is to ascertain when litigation could first have been successfully maintained. *Tucker v. Claimants in re Death of Gonzales,* 37 Colo.App. 252, 546 .2d 1271 (1975).

Here, Flatiron proceeded against Southest as assignee of its insured, seeking to recover damages for Southwest's breach of its contractual obligation to indemnify Whitlock for

property damage cause by Whitlock.

cause by Whitlock. Although at the time Flatiron brought suit against Whitlock, Whitlock might have sued Southwest for its failure to defend, that claim is not involved here. Under the statute in existence at the time, Whitlock would have had no basis for suing Southwest for failure to indemnify until Whitlock had incurred damages.

The judgment against Whitlock is dated November 19, 1984. It was not until then that the insured or its assignee could have brought a failure to indemnify action against Southwest. As third-party beneficiary, Flatiron had not sustained any damages until it had obtained a judgment against Whitlock from whom it was unable to collect.

Flatiron's action against Southwest was commenced May 14, 1987, well within the three-year period following the

accrual of its claims. Therefore, whether the threeyear or a longer period statute applies, this action was not time barred.

[2] Nelson, Haley, Patterson & Quirk, v. *Garney Cos.*, 781 P.2d 153 (Colo.App. .1989), is inapposite. In that case, this Court construed the special statute of limitation applicable only to actions against certain classes of persons listed in the statute who are engaged in construction of improvements to real property. Colo.Sess Laws 1979,ch 144, § 13-80-127 at 631 (now codified, with additional amendments, as § 13-80-104, C.R.S. (1987 Repl.Vol. 6A)). It does not specifically refer to movers. Furthermore, Whitlock's efforts in moving the monument would not constitute an improvement to real property. *See Stanske v. Wazee Electric Co.*, 722 P.2d 402 (Colo. 1986); *Calvaresi v. National*

Development Co., 772 P.2d 640 (Colo.App.1988); *Black's Law Dictionary* 682 (5th ed.1979).

II.

Southwest also contends that it did not receive timely notice of the pendency of the underlying action and that, therefore, it should have been allowed to litigate Whitlock's negligence and the reasonableness of the damages claimed. We disagree.

[3] Southwest was notified by Whitlock ten days after the collapse, and four days later denied coverage. Before the action was filed by Flatiron against Whitlock, Southwest was advised that, absent reimbursement, a lawsuit would be filed. Relying on its interpretation of the policy, it did nothing. Therefore, as stated in *Colard v. American Family Mutual Insurance Co.*, 709 P.2d 11

(Colo.App.1985), Southwest "waived its right to assert failure to timely forward suit papers as a defense because it denied liability on the basis of coverage only and did not assert the notice defense until judgment was entered against its insured and this ... action was instituted."

In denying coverage under the policy, Southwest took the risk that its interpretation of the policy could be erroneous and that it would ultimately be found liable under the policy. Absent fraud or collusion, by refusing coverage, Southwest waived its right to contest the liability of Whitlock with respect to the matters on which it was sued and the amount of Flatiron's damages.

[4] Southwest further contends that coverage for the damage to the monument is excluded by the "care, custody, or

control" or the "collapse hazard" exclusions stated in the policy. Flatiron argues that this exclusion does not apply if, as here, the work was in progress and there was a warranty that the work would be done in a workmanlike manner. We agree with Flatiron.

The policy provides in pertinent part: "This insurance does not apply:

"(a) to liability assumed by the insured under any contract or agreement, except

an incidental contract; but with respect to bodily injury or property damage occurring while work performed by the named insured is in progress, this exclusion does not apply to a warranty that such work will be done in a workmanlike manner; ...

"(k) to property damage to ...

"(3) property in the care,

custody or control of the insured, or as to which the insured is for any purpose exercising physical control;...

"(r) to property damage included within:

"(2) the collapse hazard in connection with the operation identified in this policy by a classification code number which includes the symbol c. . . . "

Inasmuch as the contract between Flatiron and Whitlock specified that Whitlock would perform work for Flatiron in a "proper, efficient, and workmanlike manner," it is undisputed that Whitlock extended a warranty of workmanlike performance.

The above-quoted policy provision (a), applicable here, eliminates the exclusion for property damage resulting

from Whitlock's work in progress that was warranted to be done in a workmanlike manner. However, provisions (k)(3), and (r)(2) pertaining to "care, custody or control" and the "Collapse hazard," equally applicable here, call for exclusions of coverage. Therefore, the exclusion provisions are ambiguous. *See Colard v. American Family Mutual Insurance Co., supra; Worsham Construction Co. v. Reliance Insurance Co.*, 687 P.2d 988 (Colo.App.1984). And, any ambiguity in the exclusionary clauses of an insurance contract must be construed in favor of the insured. *Colard v. American Family Mutual Insurance Co., supra.*

So construed, the policy affords coverage for work product damage caused by Whitlock's negligent workmanship.

Judgment affirmed.

CRISWELL and REED, JJ., concur.

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const., art. VI, Sec. 5(3), and § 24-51-1105, C.R.S. (1988) Repl.Vol. 10B).

Edward R. MASTRO, M.D., Petitioner

v.

Barbara Jean BRODIE, Respondent

No. 81SC305.

Supreme Court of Colorado
En Blanc

May 7, 1984.

Rehearing Denied May 29, 1984.

Medical malpractice action was brought. The District Court, Pueblo County, Thomas F. Phelps J., rendered summary judgment in favor of physician on ground that action was time barred, and patient appealed. The Court of Appeals, Pierce, J., 638 P.2d 800, reversed and remanded for trial. On certiorari to the Court of Appeals, the Supreme Court, Neighbors, J., held that: (1) statute of limitations in medical malpractice claim based on lack of informed consent begins to run when claimant has knowledge of facts which would put a reasonable person on notice of nature

and extent of injury and that the injury was caused by the wrongful conduct of another, an (2) material issue of fact was raised whether, during period from July 1977 to July 1979, patient should have discovered that either physician had been negligent in performing surgery or that he had failed to advise her before surgery that a keloid scar would develop and that she was a member of a high-risk class, or whether patient discovered her injury when she visited a specialist during month of August 1979, when she was advised of her high-risk status for keloid scarring, thereby precluding summary judgment on statute of limitations grounds.

Affirmed

Rovira, J., dissented and filed opinion, in which Erickson, C.J., joined.

1. Limitation of Actions 95(1)

Medical malpractice claimant must file action within two years after he or she "discovered, or in the exercise of reasonable diligence and concern should have discovered, the injury," with the repose provision prescribing filing of action more than three years after act or omission which gave rise to the claim. C.R.S. 13-80-105(1).

2. Limitation of Actions 95(1), 104(1)

Knowing-concealment and foreign-object exceptions apply only to three-year statute of repose and not to two-year statute of limitations for medical malpractice action. C.R.S. 13-80-105(1), (1)(a).

3. Limitation of Actions 104(1)

Knowing-concealment exception to three-year statute of repose was inapplicable in medical malpractice

action brought by patient against physician. C.R.S. 13-80-105(1), (1)(a).

4. Physicians and Surgeons 18.15

Since patient filed suit against physician within three years from date of act or omission, her medical malpractice claim was not barred by three-year statute of repose. C.R.S. 13-80-105(1).

5. Statutes 181(2)

Courts should not adopt a construction of a statute which may encourage the filing of frivolous claims.

6. Limitation of Actions 95(1)

Under legal-injury standard, the "act or omission" is the equivalent of wrongful conduct and is but one element of the "injury," as that word is used in two-year statute of limitations for medical malpractice action based upon lace of informed consent. C.R.S. 13-80-105(1).

7. Limitation of Actions 95(1)

Two-year statute of limitations for medical malpractice action based upon lack of informed consent begins to run when claimant has knowledge of facts which would put a reasonable person on notice of nature and extent of injury and that injury was caused by the wrongful conduct of another. C.R.S. 13-80-105(1).

8. Judgment 181(7)

In medical malpractice action brought by patient against physician, question of fact was raised whether, during period from July 1977 to July 1979, patient should have discovered that either physician had been negligent in performing surgery or that he had failed to advise her before surgery that a keloid scar could develop and that she was a member of a high-risk class, or whether patient discovered during month

of August 1979, when she was advised of her high-risk status for keloid scarring, thereby precluding summary judgment on statute of limitations grounds. C.R.S. 13-80-105(1).

Johnson, Mahoney & Scott, P.C., Paul E. Scott, Brian J. Lampert, Denver, for petitioner.

Spurgeon, Hanley & Howbert, P.C., Gregory R. Piché, Colorado Springs, for respondent.

NEIGHBORS, Justice.

We granted certiorari to review the decision of the court of appeals in *Brodie v. Mastro*, 638 P.2d 800 (Colo.App.1981), reversing the order of the district court granting summary judgment to petitioner, Dr. Edward R. Mastro (Mastro), in a medical malpractice

action. The court of appeals held that the malpractice claim of respondent, Barbara Jean Brodie (Brodie), was not barred by the applicable statute of limitations. We affirm the judgment of the court of appeals.

I.

We learn the following facts from Brodie's complaint, deposition, and affidavit filed in opposition to the motion for summary judgment.[1] On February 5, 1977, Mastro surgically removed a small nodule from the back of Brodie's shoulder.[2] He obtained Brodie's consent to the surgery after explaining

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[1] We express no opinion as to the truth of these facts. Whether Brodie can prove the facts alleged remains to be determined at trial.

[2] The surgery was performed without incident, and Brodie returned a few days later to have the stitches removed. She makes no claim that Mastro negligently performed the surgery.

that she would have a scar, "but it wouldn't be a bad one." Several months later, however, the scar from the surgery became "large, unsightly and uncomfortable." Brodie returned to Mastro in July 1977, but received no further treatment and no explanation of what had happened. He told her only that "there was nothing else he could do about [the scar]." Since that time, Brodie has had no contact with Mastro. She received treatment, including a series of injections into the scar, from two other physicians during the next two years. She also discussed the scar with at least two attorneys for whom she worked during this time period. Her scar, however, has remained approximately the same in size and appearance as when she first became aware of it. In August 1979, a physician at the University of Colorado Medical

Center informed Brodie that she had developed a "keloid"[3] on her shoulder. Further, he told her that a surgical procedure on the shoulder of young, dark-skinned individuals frequently results in the formation of a keloid, which, while unpredictable, does occur in a percentage of such patients. He indicated to Brodie's attorney that "the risk of keloid should have been anticipated" and that Mastro should have warned Brodie of such a risk before operating on her shoulder.[4]

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[3] *Dorland's Illustrated Medical Dictionary* 695 (26th ed.1981) defines "keloid" as "a sharply elevated, irregularly-shaped, progressively enlarging scar due to the formation of excessive amounts of collagen [fibrous tissue] ... during connective tissue repair."

[4] Brodie is a dark-skinned woman. She described her racial background in her deposition as "half black and half Mexican." Brodie's father had been a patient of Mastro's before her surgery.

Three months later, in November 1979, Brodie filed a complaint against Mastro in the Pueblo County District Court alleging medical malpractice. She claimed that, when she consulted him about the nodule on her shoulder, Mastro knew or should have known of the inherent risk of keloid development in a person with her physical characteristics, and that he knew or should have know that disclosure of this risk "would be of great significance to a person in [Brodie's] position in deciding to submit to surgery." Since Mastro was "under a duty to inform [Brodie] of any substantial or special risks inherent in the procedure," his failure to mention keloid scarring before the surgery prevented her from making "an intelligent choice as to alternative treatments consonant with the underlying premise of

informed consent." As a result, Brodie suffered "a serious, permanent disfiguring injury" in the form of "a large, unsightly growth" that was "plainly visible on her shoulder." While admitting that she was aware of the scar by July 1977, Brodie concluded by alleging that she was not aware and could not reasonably have been aware of "[Mastro's] negligence in failing to inform her" of the high risk of keloid formation until she consulted the physician at the medical center in August 1979, at the direction of her attorney.

After depositions of the parties were taken, Mastro filed a motion for summary judgment, claiming that the two-year statute of limitations for medical malpractice actions based on lack of informed consent barred Brodie's claim. *See* section 13-80-105(1), C.R.S.1973

(1983 Supp.).[5] Under this provision, the two-year period begins to run when the injured person discovers or in the exercise of reasonable diligence should have discovered "the injury." Mastro claimed that there was no genuine issue of material fact since Brodie "has admitted that she knew of the injury (unsightly scar) more than two years prior to initiation of her Complaint."

Brodie filed a memorandum opposing the summary judgment motion. She acknowledged that her "claim in this action is based upon [Mastro's] ... failure to secure her 'informed consent'" before operating on her shoulder. However, she argued that section 13-80-105(1) also contains an exception which, in her view, tolls the two-year statute

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[5] This statute is discussed in more detail in Part II, *infra*.

of limitations if the act or omission giving rise to a cause of action is "knowingly concealed." *See* section 13-80-105(1)(a), C.R.S. 1973 (1983 Supp.).[6] Relying on this provision, Brodie argued that Mastro "knowingly concealed" from her the high risk of keloid formation. She stated in her affidavit that she did not learn of the existence of this risk until August 1979, when she consulted the surgeon in Denver about her scar.

The district court granted the motion for summary judgment. It concluded that the two-year statute of limitations began to run no later than July 1977, when Brodie returned to Mastro's office "to complain about the

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[6] This statute is also discussed in Part II *infra*. If an act or omission giving rise to a cause of action is "knowingly concealed," the injured person must file the action within two years after he or she discovers or should have discovered "the act or omission."

enlarged scar," and expired in July 1979, four months before she filed her complaint. The court explained its decision in terms of when Brodie discovered her "injury":

> "In July, 1977, the scar had achieved such proportions that [she] returned to [see Mastro] because the scar was large, unsightly and uncomfortable. [Brodie] discovered the injury in July, 1977, at the very latest. She was fully aware of it at that point, and its very existence made her cognizant of the risks involved in the February 5, 1977 surgery. She knew that a keloid formation was not only a risk but a reality for shoulder surgery on a young, dark-skinned female."

A divided panel of the Colorado Court of Appeals reversed the judgment of

the district court. The majority conceded that, "[i]f the only allegation here was uninformed consent," the two-year statute of limitations in section 13-80-105(1) would bar Brodie's action.[7] However, since Brodie also alleged knowing concealment against Mastro, the court decided that the exception provided by section 13-80-105(1)(a) might be applicable to Brodie's action. According to the majority, the issue was whether Mastro knowingly concealed from Brodie the high risk of keloid scarring to one

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[7] "If the only allegation here were uninformed consent, we would agree that the portion of the statute is conclusive as it only requires that the patient be aware, or should have become aware of the injury. It is undisputed that her awareness occurred more than two years prior to her filing this lawsuit." *Brodie v. Mastro,* 638 P.2d 800, 801 (Colo.App.1981).

of her skin pigmentation.[8] Since the evidence on this issue was "contradictory," the court concluded that it "should not have been disposed of by summary judgment." *Brodie*, 638 P.2d at 801.[9]

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[8] The majority did not elaborate on how or when Mastro may have engaged in knowing concealment. The principal focus of its opinion was that the failure to warn Brodie about the risk of keloid scarring may have constituted knowing concealment, regardless of when the failure to warn took place.

[9] Judge Coyte, in his dissent, emphasized the distinction between lack of informed consent and knowing concealment:

> "The exception to the statute relied upon by the majority, in my view, has no application to the facts in this case. As I read the statute, an action for lack of informed consent is barred if not brought within the two year period. The exception quoted has application if, *e.g.* the damaged party, the plaintiff in this case, were to question the surgeon as to the results and then he were to conceal the results of the surgery from the patient. This is what I believe the statute referred to when it states: 'If the act or omission which gave

II.

Brodie's claim for medical malpractice is premised on the theory of lack of informed consent prior to the surgery which occurred on February 5, 1977. Her complaint was not filed until November 19, 1979. Mastro pleaded the affirmative defense of the statute of

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rise to the cause of action was knowingly concealed by the person committing such act or omission.'

"The claim for relief here is that Dr. Mastro did not have plaintiff's informed consent to perform the operation. It would be immaterial if the lack of informed consent resulted from 'knowingly concealing' not advising or misadvising. Such action would be barred within the two year period 'after the person bring the action discovered, or in the exercise of reasonable diligence ... should have discovered the injury.'

"Here, plaintiff was fully aware of the results of her surgery in July 1977, when she returned to complain to Dr. Mastro of the results of the surgery. At the time this action was commenced on November 19, 1979, it was barred by § 13-80-105, C.R.S.1973 (1980 Cum.Supp.)."

limitations contained in section 13-80-105, C.R.S.1973 (1983 Supp.). In order to avoid the two-year statute of limitations defense, Brodie relies upon the knowing concealment exception contained in section 13-80-105(1)(a). thus, the first issue to be resolved is whether knowing concealment is an exception to the two-year statute of limitations.

A.

Section 13-80-105(1) establishes a two-year statute of limitations for medical malpractice actions based on lack of informed consent. The statute provides:

> "No person shall be permitted to maintain an action, whether such action sounds in tort or contract, to recover damages from ... any person licensed in this state ... to

practice medicine, ... on account of the alleged negligence, breach of contract, or lack of informed consent of such person in the practice of the profession for which he is licensed ... unless such action is instituted within two years after the person bringing the action discovered, or in the exercise of reasonable diligence and concern should have discovered, the injury. *In no event may such action be instituted more than three years after the act or omission which gave rise thereto, subject to the following exception:*"

(Emphasis added.) The underlined language creates a three-year statute of repose, subject to statutory and judicial exceptions. *See Austin v. Litvak,* 682 P.2d 41 (Colo.1984). The exception for

knowing concealment in section 13-80-105(1)(a) states:

> "if the act or omission which gave rise to the cause of action was knowingly concealed by the person committing such act or omission, ... then such action may be instituted within two years after the person bringing the action discovered, or in the exercise of reasonable diligence and concern should have discovered, the act or omission, ..."[10]

[1,2] In construing these

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[10] Subsection (a) also contains an exception to the three-year statute of repose where the "act or omission consisted of leaving an unauthorized foreign object in the body of the patient...." The exception provided in subsection(b) applies to actions brought by or on behalf of minors who are under the age of six years on the date of the act or omission. This subsection requires that the case be instituted within two years after the child reaches six years of age.

provisions, we conclude that a medical malpractice claimant must file an action within two years after he or she "discovered, or in the exercise of reasonable diligence and concern should have discovered, the injury." Section 13-80-105(1). In addition to this period of limitation, the repose provision proscribes the filing of an action more than three years after the act of omission which gave rise to the claim. However, section 13-80-105(1)(a) contains two exceptions to the three-year period of repose. First the claim is not barred if the person who committed the act or omission knowingly conceals that fact. Second, the claim is excepted from the period of repose if the physician left an unauthorized foreign object in the claimant's body. Under either exception, however, the medical malpractice action

must be filed within two years after the plaintiff discovers or should have discovered the defendant's act or omission. We are persuaded that the knowing concealment and foreign object exceptions apply onlyto the three-year statute of repose and not to the two-year statute of limitations. *See Sanchez v. South Hoover Hospital,* 18 Cal.3d 93, 132 Cal.Rptr. 657, 553 P.2d 1129 (Cal.1976); *Graham v. Hansen,* 128 Cal.App.3d 965, 180 Cal.Rptr. 604 (1982).

[3,4] In applying this statutory interpretation to the facts of this case, we hold that the knowing concealment exception is inapplicable. Brodie filed suit against Mastro within three years from February 5, 1977, the date of the act or omission. Thus, her claim is not barred by the three-year statute of repose. We conclude that the pivotal

question in this case is whether Brodie filed suit within two years after she "discovered, or in the exercise of reasonable diligence and concern should have discovered, the *injury*." Section 13-80-105(1) (emphasis added). Therefore, we must interpret the word "injury" as it appears in the statute of limitations governing medical malpractice cases.

B.

Section 13-80-105, C.R.S.1973 (1983 Supp.), became effective on July 1, 1977.[11] Before that date, the statute prohibited a person from maintaining a malpractice action sounding in "tort or contract" to be maintained:

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[11] *See* An Act Concerning Limitation of Actions, and relating to the Period During Which a Person May Maintain an Action for Medical Malpractice, Colo.Sess.Laws 1977, ch. 198, 13-80-105(1)(a) at 817.

> "[u]nless such action is instituted within two years after the person bringing the action either discovered or in the exercise of reasonable diligence and concern should have discovered the seriousness and character of his injuries and the negligence or breach of contract which gave rise to such action. In no event may such action be instituted more than six years after the act or omission which gave rise thereto...."

Section 13-80-105, C.R.S.1973. A separate statute, section 13-80-105.5, C.R.S.1973, established another two-year statute of limitations for malpractice actions based on lack of informed consent. The General Assembly repealed section 13-80-105.5, effective July 1, 1977, and inserted lack of informed

consent in section 13-80-105. It also deleted the words "seriousness and character of his injuries," "negligence," and "breach of contract," substituted the generic word "injury" which had been used in the informed consent provision, and added the words "act or omission." We view this action by the legislature as an effort to combine a number of complex legal concepts into three legal terms.

C.

There are at least three possible interpretations of the word "injury": (1) the alleged negligent act or omission; (2) the physical damage or manifestation resulting from the act or omission; or (3) the legal injury, i.e., all the essential elements of a claim for medical malpractice.

At least two courts have adopted the first definition. *See Landgraff v.*

Wagner, 26 Ariz.App. 49, 546 P.2d 26 (Ariz.App.), *appeal dismissed*, 429 U.S. 806, 97 S.Ct. 40, 50 L.Ed.2d 67 (1976); *Dunn v. St. Francis Hospital, Inc.*, 401 A.2d 77 (Del. 1979). We reject this interpretation of the word. The legislature clearly intended that the word "injury" have a different meaning than "act or omission" because the three words are each used in the malpractice statute. *See Allen v. Newport*, 427 F.Supp. 42 (M.D.Tenn.1976). A claimant must file suit within two years after discovering the "injury" and, in no event, more than three years after the date of the "act or omission." Moreover, such a construction defeats the purpose of the discovery rule which has been specifically adopted by the legislature.

[5] Likewise, we reject the interpretation that the "injury" occurs

for purposes of the statute of limitations on the date of the injury manifests itself in a physically objective and ascertainable manner. The physical damage test fails to account adequately for all relevant factors. In some cases, such as the discovery of a sponge left in the patient during surgery (*Peralta v. Martinez*, 90 N.M. 391, 564 P.2d 194 (N.M.App.1977), the discovery of the physical injury may occur simultaneously with the discovery of the only possible cause, i.e., the doctor's negligence. However, where the injury is consistent with post-operative recovery and treatment is continued by the treating doctor who reassures the patient that there is no permanent damage, the patient who reasonably trusts the doctor and relies upon the physician's advice would be unfairly barred from bringing

suit. In addition, the physical injury standard requires a claimant to immediately file suit against a physician, even though the plaintiff has no knowledge of any wrongful conduct on the part of the doctor. Courts should not adopt a construction of a statute which may encourage the filing of frivolous claims. In *Foil v. Ballinger*, 601 P.2d 144, 147-48 (Utah 1979), the Utah Supreme Court cogently summarized the rationale for rejecting this interpretation of the word "injury":

> "While the recipient may be aware of a disability of dysfunction, there may be, to the untutored understanding of the average layman, no apparent connection between the treatment provided by a physician and the injury suffered. Even if there is,

it may be passed off as an unavoidable side effect or a side effect that will pass with time.... [W]hen injuries are suffered that have been caused by an unknown act of negligence by an expert, the law ought not to be construed to destroy a right of action before a person even becomes aware of the existence of that right.

"Furthermore, to adopt a construction ... that encourages a person who experiences an injury, dysfunction or ailment, and has no knowledge of its cause, to file a lawsuit against a health care provider to prevent a statute of limitations from running is not consistent with the unarguably sound proposition that unfounded claims should be strongly discouraged....

"It would also be imprudent to adopt a rule that might tempt some health care providers to fail to advise patients of mistakes that have been made and even to make efforts to suppress knowledge of such mistakes in the hope that the running of the statute of limitations would make a valid cause of action non-actionable."

[6] The most recent pronouncement by an appellate court involving a statute which employs the words "act or omission" and "injury" is found in *Moore v. Jackson Park Hospital,* 95 Ill.2d 223, 69 Ill.Dec. 191, 447 N.E.2d 408 (Ill.1983). The Illinois statute formulates the discovery rule as the claimant "knew, or through the use of reasonable diligence should have known," Ill.Rev.Stat., ch. 83 ¶ 22.1 (1977). This discovery rule is phrased

in the Colorado statute as "discovered, or in the exercise of reasonable diligence and concern should have discovered...." Section 13-80-105(1), C.R.S.1973 (1983 Supp.) We view this semantic difference as insignificant. The Illinois Supreme Court adhered to its previously adopted legal injury rule and stated:

> "In medical malpractice cases in which the discovery rule is applied the cause of action accrues when the plaintiff knows or reasonably should know of an injury and also knows or reasonably should know that it was wrongfully caused.... Logic dictates, that a plaintiff cannot bring a cause of action until he knows or reasonably should know of his injury, and also knows or reasonably should know that

the injury was caused by the wrongful acts of another."

Moore, 69 Ill.Dec. at 226-27, 447 N.E.2d at 411-12. We are persuaded that under the legal injury standard, the "act or omission" is the equivalent of wrongful conduct and is but one element of the "injury," as that word is used in the two-year statute of limitations.

[7] We hold that the statute of limitations begins to run when the claimant has knowledge of facts which would put a reasonable person on notice of the nature and extent of an injury and that the injury was caused by the wrongful conduct of another. The overwhelming majority of state appellate courts which have addressed the issue here have adopted the "legal injury" construction of the word "injury" used in statutes of limitation governing medical

malpractice actions. The focus is on the plaintiff's knowledge of facts, rather than on discovery of applicable legal theories. Decisions by the appellate courts of California, Hawaii, Iowa, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oregon, Utah, and West Virginia support this interpretation of the word "injury."[12]

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[12] *See Graham v. Hansen*, 128 Cal.App.3d 965, 180 Cal.Rptr. 604 (1982) (statute of limitations begins to run when the patient has before him facts which would put a reasonable person on inquiry notice of his possible cause of action, whether or not it has occurred to the particular patient to seek further medical advice); *Yamaguchi v. Queen's Medical Ctr.*, 648 P.2d 689 (Hawaii 1982) (cause of action accrues when the plaintiff discovers, or should have discovered, the negligent act, the damage, and the causal connection between the former and latter); *Baines v. Blenderman*, 223 N.W.2d 199 (Iowa 1974) (statute of limitations does not begin to run in a medical malpractice case until the injured person knows or can be charged with knowledge of the existence of his cause of action); *Massey v. Litton*, 669 P.2d 248 (Nev.1983) ("injury" as used in medical malpractice statute of

limitations means legal injury, i.e., all essential elements of malpractice cause of action); *Brown v. Mary Hitchcock Memorial Hosp.*, 117 N.H. 739, 378 A.2d 1138 (1977) (in a medical malpractice case the plaintiff's cause of action does not accrue until he discovers, or should (not could) have discovered, that the injury may have been caused by the defendant's negligent conduct); *Silverman v. Lathrop,* 168 N.J. Super. 333, 403 A.2d 18 (1979) (cause of action accrues not when the plaintiff receives legal advice as to the merits of his claim, but rather when he discovers significant facts which provide the basis for a medical malpractice claim); *Iverson v. Lancaster,* 158 N.W.2d 507 (N.D.1968) (limitations period commences to run against malpractice plaintiff from time act of malpractice with resulting injury is, or by reasonable diligence could be, discovered); *Schiele v. Hobart Corp.*, 284 Or. 483, 587 P.2d 1010 (1978) (statute of limitations for commencing action to recover for injuries to person begins to run on claim for occupational disease allegedly resulting from defendant's negligence when a reasonably prudent person associates his symptoms with a serious or permanent condition and at the same time perceives the role which the defendant played in causing that condition); *Berry v. Branner,* 245 Or. 307, 421 P.2d 996 (1966) (the cause of action for medical malpractice accrued at the time plaintiffs obtained knowledge, or reasonably should have obtained knowledge, of the tort committed upon her person by defendant). *see also Duncan v.*

D.

We turn to the question of whether the trial court properly granted the motion for summary judgment filed by Mastro. The trial court and the court of appeals concluded that Brodie discovered her injury in July of 1977. However, we believe that there are issues of material fact to be resolved at trial.

In *Baines v. Blenderman*, 223 N.W.2d 199 (Iowa 1974), the Iowa Supreme Court held that the discovery rule requires both knowledge by the claimant than an

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Augter, 62 Or.App. 250, 661 P.2d 83 (1983), and *Dortch v. A.H. Robins Co. Inc.*, 59 Or.App. 310, 650 P.2d 1046 (1982); *Foil v. Ballinger*, 601 P.2d 144 (Utah 1979) (the term "discovery of injury" means discovery of the physical injury and the negligence which resulted in the injury); *Renner v. Asli*, 280 S.E.2d 240 (W.Va.1981) (limitations period does not begin to run until the plaintiff has knowledge, or in the exercise of reasonable diligence has reason to know, of the medical malpractice).

injury has occurred and that the injury was caused by the wrongful conduct of the defendant. In *Baines*, the defendant argued that the claimant's perception of physical harm should be equated with imputed knowledge of its origin in malpractice. The court rejected the contention. The court stated that knowledge of an injury may or may not be sufficient to alert a reasonably diligent person to the basis of a claim, depending upon the circumstances of the case. However, in order for the statute of limitations to bar the claim, it is not necessary for the defendant-physician to prove that the claimant knew the specific acts of negligence committed by the defendant or that he knew the details of the evidence which were necessary to prove the claim. It is enough that the claimant knew, or may reasonably be

charged with knowledge of, sufficient facts to be aware that a claim existed more than two years before it was filed.

[8] The court in *Baines* stated that the fact the claimant received assurances from his doctor that nothing was wrong, although a factor to be considered on the issue of reasonable diligence, does not necessarily mean that the plaintiff should have know sooner than he did of the defendant's alleged malpractice. Thus, the court concluded it is a question of fact as to when the plaintiff discovered, or in the exercise of reasonable care should have discovered, that his injuries were caused by the wrongful conduct of the defendant. The court held that in such cases summary judgment is inappropriate. This result is consistent with our decisions in *Owens v. Brochner,* 172 Colo. 525, 474 P.2d 603

(1970), and *Davis v. Bonebrake,* 135 Colo. 506, 313 P.2d 982 (1957), in which we held that whether the statute of limitations bars a particular claim is a fact question. Therefore, only in the clearest of cases may a summary judgment motion be granted where discovery of the injury is the pivotal issue. Here, it is a question of fact whether, during the period from July 1977 to July 1979, Brodie should have discovered that either Mastro had been negligent in performing the surgery or that he had failed to advise her before surgery that a keloid scar could develop and that she was a member of a high risk class, or whether Brodie discovered her injury when she visited the specialist in Denver during the month of August 1979, when she was advised of her high risk status for keloid scarring.

The judgement of the court of appeals is affirmed.

ROVIRA, J., dissents.

ERICKSON, C.J., joins in the dissent.

ROVIRA, Justice, dissenting.

I dissent from Parts II(B), (C), and (D) of the majority opinion. In particular, I disagree with the majority's interpretation of the word "injury" and with the majority's application of that interpretation to the facts of this case. In both instances, the analysis presented by the majority is carefully tailored to achieve a certain result. It also signifies a growing discomfort in close cases with the standard operation of statutes of limitation. I am not unaware of these tensions. At the same time, I prefer a more straightforward approach than that

adopted by the majority in this case.

On its face, section 13-80-105 neither defines the word "injury" nor provides guidance on how to determine when an injury has been discovered. The majority therefore identifies and compares several interpretations before deciding that the "legal injury" interpretation is what the legislature really intended when it enacted the statute. In my view, however, the "legal injury" interpretation ignores the recent legislative history of section 13-80-105. This statute was amended on July 1, 1977.[13] Before that date, persons were prohibited from maintaining malpractice actions based on negligence or breach of

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[1] *See* An Act Concerning Limitation of Actions, and Relating to the Period During Which a Person May Maintain an Action for Medical Malpractice, Colo.Sess.Laws 1977, ch. 198, 13-80-105(1) at 817.

contract

> "unless such action is instituted within two years after the person bringing the action either discovered, or in the exercise of reasonable diligence and concern should have discovered, the seriousness and character of his injuries *and* the negligence or breach of contract which gave rise to such action. In no event may such action be instituted more than five years after the act or omission which gave rise thereto...."

Section 13-80-105, C.R.S.1973 (emphasis added.) A separate statute established another two-year statute of limitations for malpractice actions based on lack of informed consent. It provided:

> "No person shall be permitted to maintain an action for noncompliance

> with [the statute imposing a duty on physicians to provide information sufficient for informed consent] unless such action is instituted within two years after the person bringing the action either discovered or in the exercise of reasonable diligence and concern should have discovered the *injury* about which the patient was not informed."

Section 13-80-105.5, C.R.S.1973 (1976 Supp.) (emphasis added). Effective July 1, 1977, the General Assembly revised and combined these two statutes. It repealed section 13-80-105.5 and inserted "lack of informed consent" in section 13-80-105. It also deleted the provision in section 13-80-105 calling for discovery of the negligence or breach of contract which gave rise to such action.

These changes convince me that the word "injury," as used in the current statute, does not mean "legal injury." It defies common sense to conclude, as the majority does, at 1167, that even though the legislature deleted the words "and the negligence or breach of contract" from the statute, it simultaneously inserted the concept of legal injury into the single word "injury" that remained in the statute. If the legislature intended the revised statute to include the concept of legal injury, it certainly would have avoided such confusion subterfuge. In the language of the majority, it would have "combine[d] a number of complex legal concepts into [one] legal term," *id.*, and that term would have been "legal injury."

In analyzing the current statute, I do not disagree with the basic premise

that "injury" must mean something more than mere physical damage or manifestation. For example, the injured person may be aware of a physical manifestation but have no understanding of its seriousness; or the injured person may be aware of it seriousness but not associate it with a particular time, place, or person. In either situation, a person discovering the physical manifestation could be barred unfairly by the running of the statute of limitations. In *Gleason v. Guzman,* 623 P.2d 378 (Colo.1981), we invalidated a personal injury release on the grounds that the executor of the release was mistaken about the true nature of the injury suffered. We stated:

> "Knowledge of the nature of an injury requires an awareness and some appreciation of its extent,

> severity and likely duration. *See, e.g.*, ... *Mitzel v. Schatz*, 175 N.W.2d 659 (N.D.1970); *Poti v. New England Road Machinery Co.*, 83 N.H. 232, 140 A. 587 (1928). Admittedly, line-drawing here is difficult and its direction may well vary with the thrust of evidence. These basic components of knowledge, however, relate primarily to a comprehension of the basic character of the injury as distinct from a prediction or opinion about the future course of recovery when its basic nature is otherwise unknown."

Gleason, 623 P.2d at 385.

I would prefer that this court adopt an approach similar to *Gleason* in this case. Our emphasis in *Gleason* on recognizing the seriousness and character of one's injury represents a middle

ground between the view that discovery of the physical injury is enough, *see Allen v. Newport,* 427 F.Supp. 42 (M.D.Tenn.1976), and the view that discovery of the "legal injury" is required. Under this approach, the pivotal question in this case becomes whether Brodie discovered or reasonably should have discovered the "seriousness and character" of her injury more than two years before she filed her complaint.

As a general rule, the trier of fact should decide whether the statute of limitations bars a particular claim. *Owens v. Brochner,* 172 Colo. 525, 474 P.2d 603 (1970); *Davis v. Bonebrake,* 135 Colo. 506, 313 P.2d 982 (1957). However, the trial court in this case decided that summary judgment was appropriate, since the evidence, when viewed in the light most favorable to Brodie, revealed that

she was "fully aware" of her injury by July 1977. The court of appeals agreed; in its view, the evidence was "undisputed" that Brodie discovered her injury more than two years before she filed her complaint. *Brodie V. Mastro,* 638 P.2d 800, 801 (Colo.App.1981). After reviewing Brodie's deposition, I concur with the courts below that she discovered her injury by July 1977.

Brodie originally went to see Mastro in part because both she and her mother thought the nodule might be cancerous. She did not consider the nodule unsightly and would have declined surgery had she known that a large and "ugly" scar would develop on her shoulder. She specifically asked Mastro about scarring because she did not want a bad scar. The scar from the surgery was small and normal-looking when Brodie returned to

have the sutures removed. She did not discuss the surgery at that time because "[t]here was nothing wrong then." During the next several months, both she and her mother noticed that the scar was "growing" and "getting bigger." It itched and became painful. Brodie knew that the scar was "real bad" and did not resemble other scars she had on her own body and other scars she had seen. As she kept track of the scar on her shoulder, she became aware for the first time that scars could become "this big or this unsightly." She returned to Mastro's office in July 1977 specifically to complain about the size and appearance of the scar. It was enlarged, raised, unsightly, uncomfortable, and painful in July 1977. She found it embarrassing and tried to cover it with clothing so that other people would not see it. After

Mastro told her there was nothing more he could do, Brodie sought out and received further treatment, including a series of injections into the scar tissue, from at least two other doctors, neither of whom mentioned keloids or the risk of keloids. She also discussed her scar with at least two attorneys because she remained "unhappy" about what had happened. She waited, however, until the latter part of 1979 to bring her action because she wanted, if possible, to "tr[y] to get it fixed" first. Finally, after the plastic surgeon explained to her the nature of keloids, she brought her action against Mastro because he "misled" her by not warning her about the risk of bad scarring.

Brodie's deposition testimony indicates that she discovered the physical manifestation resulting from the

surgery within several months after the surgery on her shoulder. It also demonstrates that she was fully aware of both the seriousness and character of her injury when she saw Mastro in July 1977. At that point, she had a true appreciation of the extent and severity of her injury and a clear perception of Mastro's role in inducing it. She knew and was upset that Mastro had not warned her about the possibility of bad scarring. The *only* piece of information not in her possession in July 1977 was the knowledge that, as a young, dark-skinned female, she fit into a high-risk category. While this knowledge may have increased her understanding about what happened, she did not need to know *why* the keloid appeared in order to bring an action based on lack of informed consent. She only needed to know that it *did*

appear and that Mastro never warned her about it.

This point can best be illustrated by analogizing Brodie's situation to that of a light-skinned person. If a light-skinned person undergoes surgery and develops a keloid, and if the physician never mentioned the admittedly low risk of keloid scarring in a light-skinned person, that person would have a cause of action based on lack of informed consent. *See Bloskas v. Murray,* 646 P.2d 907 (Colo.1982) (duty to warn turns on significance of the risk to the patient's informed decision to submit to the medical procedure); *Mallet v. Pirkey,* 171 Colo. 271, 466 P.2d 466 (1970) (physician has affirmative duty to warn patient of substantial risks). The complaint would allege that the physician never warned the patient about the risk of bad

scarring. The fact that a light-skinned person fits into a low-risk category would be of no significance to the plaintiff's cause of action. That fact would only be important when the trier of fact decided if the physician's failure to warn was consistent with community standards for this particular risk. *See Bloskas,* 646 P.2d at 914 (duty of disclosure depends upon the extent of information given by reasonably careful physicians in the same or similar community); *Miller v. Van Newkirk,* 628 P.2d 143 (Colo.App.1980) (whether disclosure was adequate depends upon community standards); *Stauffer v. Karabin,* 30 Colo.App. 357, 492 P.2d 862 (1971) (failure to inform must be consistent with community standards);

Colo. J.I. 15:16 (1984 Supp.).[14]

I see no reason to distinguish between a light-skinned person, with a low risk of keloid scarring, and a dark-skinned person, with a high risk of keloid scarring, for purposes of determining when a person discovers his

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2. "Before a physician (treats) (operates on) (or) (performs a procedure on) a patient, he has a duty to secure the informed consent, whether express or implied, from the patient.
For a patient's consent to be an informed consent, a physician must have informed the patient of the following:
1. The nature of the ailment;
2. The nature of the (operation) (procedure) (or) (treatment);
3. The alternative treatments available, if any, and
4. The substantial risks, if any, involved in undergoing the (operation) (procedure) (or) (treatment), and the substantial risks, if any, involved in undergoing any alternative treatments available.
A physician has a duty to inform a patient of the above ... items to the extent a reasonable physician practicing in the same field of practice (as a general practitioner in the same or similar locality) (as a specialist) at the same time would have informed

4.

the patient under the same or similar circumstances."

or her injury. Discovery of injury in an informed consent case should not mean one thing for a low-risk person and another for a high-risk person. Yet, by suggesting that Brodie may not have completed the necessary discovery until she learned of her high risk, the majority appears to have imposed an artificial distinction based on a person's particular level of risk. That level of risk will affect the factual determination at trial of whether the failure to warn was consistent with community standards, It should not, however, affect the outcome of a summary judgment motion based on the running of the two-year statute of limitations. The outcome in this case is dependent upon whether Brodie discovered the seriousness and character of her injury and whether she realized that Mastro never warned her about the possibility of bad scarring.

In my view, she made the necessary discovery in July 1977, more than two years before she filed her complaint.

Accordingly, I dissent.

I am authorized to say that ERICKSON, C.J., joins in this dissent.

Wayne M. PISTORA and Michelle Pistora
Plaintiffs-Appellants,

v.

Crystal D. RENDON,
Defendant-Appellee

No. 87CA1650.

Colorado Court of Appeals, Div. I.

Nov. 25, 1988

Plaintiffs brought suit seeking damages for personal injuries sustained in automobile collision. The District Court, Adams County, Donald W. Marshall, Jr., J., dismissed the suit with prejudice for failure to meet threshold medical expense requirement of the No Fault Act. Plaintiffs appealed. The Court of Appeals, Sternberg, J., held that dismissal without rather than with prejudice was the appropriate penalty, given plaintiffs'

assertion that medical treatment of injuries sustained was ongoing, and thus expenses were likely to exceed the $2,500 threshold in the foreseeable future.

Reversed and remanded with directions.

1. Judgement 185.2(9)

Failure to respond to a motion for summary judgment, in and of itself, cannot serve as the basis for entry of judgment. Rules Civ.Proc., Rule 56.

2. Pretrial Procedure 690

Suit seeking damages for personal injuries sustained in automobile collision should not have been dismissed with prejudice for failure to meet threshold requirement for medical expense of $2,500; dismissal without prejudice was the appropriate penalty in view of plaintiffs' assertion that medical treatment of the injuries was ongoing, and thus expenses were likely

to exceed the $2,500 threshold in the foreseeable future. C.R.S. 10-4-714.

Wilcox & Ogden, Ralph Ogden, Denver for plaintiffs-appellants.

Robert Hibschweiler, Charles T. Trowbridge, Littleton, for defendant-appellee.

STERNBERG, Judge.

Wayne M.and Michelle Pistora appeal the dismissal with prejudice of their suit seeking damages for personal injuries sustained in an automobile collision with the defendant, Crystal D. Rendon. We reverse.

The accident occurred on February 7, 1986, and suit was filed on May 21 of that year. On August 24, 1987, Pistoras' counsel filed a trial data certificate in which the medical expenses were shown to total $1,800. By one provision of the "No Fault"

Motor Vehicle Insurance Act, § 10-4-714, C.R.S.(1987 Repl. Vol. 4A), an action such as this cannot be maintained unless medical expenses exceed a threshold requirement of $2,500. On August 27, Rendon moved for dismissal for failure to meet the threshold medical expense requirement.

The Pistoras did not respond directly to that motion. The trial court treated it "as being under C.R.C.P. 56 and as seeking a final order of judgment" and, on September 21, dismissed the action with prejudice. Two days later, however, the Pistoras moved that the action be dismissed without prejudice for failure to meet the threshold requirement and also filed a separate motion for reconsideration of the September 21 order of dismissal. The trial court denied the motion, and this appeal followed.

(1) In its entry of summary judgment on September 21, the court noted, inter alia, that the Pistoras had not responded to the motion. Failure to respond to a motion for summary judgment, in and of itself, cannot serve as the basis for entry of judgment. Seal v. Hart, 755 P.2d 462 (Colo. App.1988). Thus, the issue presented is whether the trial court abused its discretion in dismissing the suit with, rather than than without, prejudice.

In arguing that the dismissal should be without prejudice, the Pistoras point out that medical treatment of the injuries sustained was of an ongoing nature and, thus, was likely to exceed the $2,500 threshold in the foreseeable future. We note that, had the Pistoras' motion for dismissal without prejudice

for failure to reach the threshold been filed prior to that of the defendants, such motion might properly have been granted under C.R.C.P. 41(a)(1)(B).

A trial court's exercise of discretion is not without bounds. See Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112(Colo. 1986); Rudd v. Rogerson, 152 Colo. 370, 381 P.2d 995(1963). In determining whether there has been an abuse of discretion, it should be borne in mind that courts exist primarily to afford a forum to settle disputes between parties on the merits. Mizar v. Jones, 157 Colo. 535, 403 P.2d 767(1965).

In Nagy v. District Court, 762 P.2d 158 (Colo.1988), the supreme court held the trial court erred in preventing

plaintiffs from testifying as a sanction for their not having filed a timely trial data certificate. Similarly, in Kwik Way Stores, Inc. v. Caldwell, 745 P.2d 672(Colo.1987), the supreme court held the sanction of a default judgment to be too severe under facts presented for failure to comply with a discovery order. See also Buckmiller v. Safeway Stores, Inc., supra; AAA Crane Service, Inc. v. OmniBank University Hills, 723 P.2d 156 (Colo.App.1986); Group 1 Services, Ltd. v. Michilleti, 650 P.2d 1305 (Colo.App.1982). These cases concerning the appropriate sanctions for procedural violations are instructive here.

(2) We conclude that sealing the courthouse doors to the Pistoras by preventing them from ever litigating the substance of their claims, should the $2,500 medical threshold be exceeded, is too severe a punishment for the premature filing of their action. Hence, the dismissal with prejudice constitutes an abuse of discretion; instead, dismissal without prejudice is the appropriate penalty. With that type of dismissal, should the damages threshold be exceeded, then the case can be refiled and decided on its merits; if not, the case is ended.

The judgment is reversed and the cause is remanded with directions to enter judgment dismissing the action without

prejudice.

PIERCE and REED, JJ., concur.

Murelena STACKHOUSE, Appellant,

v.

Mark M. SCHNEIDER and Ebbitt Green Electronic, Inc., Appelless.

No. 88-163

District of Columbia Court of Appeals.

Argued Feb. 15, 1989
Decided May 26, 1989

Automobile accident victim brought action against driver of second vehicle involved in accident and driver's employer. The Superior Court, District of Columbia, Bruce D. Beaudin, J., dismissed. Victim appealed. The Court of Appeals, Mack, J., held that statute of limitations for bringing action under Compulsory No-Fault Motor Vehicle Insurance Act began to run When victim qualified under one of exceptions to maintain action under Act.

Reversed and remanded.

Limitation of Actions 95(4)

Statute of limitations for maintaining action under Compulsory No-Fault Motor Vehicle Insurance Act begins to run when injured party knows, or exercising reasonable diligence should know, that party qualifies under one of six exceptions in Act, rather than on date of injury. D.C. Code 1981, §§ 12-301(8), 35-2105.

Frederic W. Schwartz, Jr. with whom Robert Cadeaux, Washington, D.C., was on brief, for appellant.

Bruce R. Robertson, Alexandria, Va., for appellees.

Before MACK, NEWMAN and SCHWELB, Associate Judges.

MACK, Associate Judge:

This appeal presents the narrow issue of when the statute of limitations for bringing an action under the Compulsory No-Fault Motor Vehicle Insurance Act of 1982, D.C.Code § 35-2101 et seq. (1985 Supp.) begins to run. All parties agree that the general Code provision would prohibit an action "for which a limitation is not otherwise specifically prescribed" from being brought after three years from the time the right to maintain the action accrues. We reject appellees' contention that the action in this case accrued at the time of injury. We hold that the statute of limitations began to run when the injured party qualified under on of the six exceptions of § 35-2105 to maintain an action under the No-Fault Act.

On June 1, 1984, Mr. Schneider, operating a motor vehicle owned by his employer,

Ebbitt Green Electronics, Inc., allegedly collided with a motor vehicle owned and operated by Ms. Stackhouse. As a result, Ms. Stackhouse sustained injuries to her neck and back. However, at the time of the accident and for nearly two years thereafter, she failed to qualify under any of the six exceptions of the No-Fault Act which would have permitted her to bring an action for non-economic losses. It was not until approximately May 19, 1986 that Ms. Stackhouse satisfied one of the § 35-2105 exceptions when her medical expenses exceeded $5,000 for the first time. On June 30, 1987, more than three years after the accident but within three years of qualifying under the exception permitting her to maintain and action, Ms. Stackhouse filed a complaint.

Ebbitt Green Electronics, Inc. moved to dismiss the action asserting that the three-year statute of limitations applicable to such actions had expired. See D.C. Code § 12-301(8) (1981). Ms. Stackhouse responded by asserting that she was not entitled to maintain the action before May 19, 1986 when her medical expenses first exceeded $5,000, and therefore the limitations period was appropriately calculated from that date, rather than the date of injury. The trial court rejected Ms. Stackhouse's argument and granted the motion to dismiss. We disagree and reverse the trial court's order.

D.C.Code § 12-301(8) is the applicable statute of limitations, which reads as follows:

> Except as otherwise specifically provided by law, actions for the

following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

* * * * *

(8) for which a limitation is not otherwise specially prescribed--3 years.

Emphasis added. The general rule in this jurisdiction is that the statute of limitations for personal injury actions begins to run on the date of injury. See Shehyn v. District of Columbia, 392 A.2d 1008, 1013 (D.C. 1978). In the vast majority of cases, this is true because the date of injury is also the date on which a plaintiff can first maintain an action. However, it does not follow that in every case it is the date of injury

that triggers the running of the statute of limitations.

A well-established exception to the date-of-injury standard is the discovery rule, which tolls the statute of limitations during the time in which an injury could not reasonably have been discovered. See e.g., Knight v. Furlow, 553 A.2d 1232, 1234 (D.C. (1989); Bussineau v. President and Directors of Georgetown College, 518 A.2d 423 (D.C.1986); Ehrenhaft v. Malcolm Price, Inc., 483 A.2d 1192 (D.C. 1984). The discovery rule emerged to "redress situations in which the fact of injury was not readily apparent and indeed might not become apparent for several years after the incident causing injury had occurred." Ehrenhat, supra, 483 A.2d at 1201. A disability of a plaintiff, i.e minority, lack of mental capacity, or imprisonment, also tolls the statute of

limitations. D.C. Code 12-302 (1981); see, e.g., District of Columbia ex rel. W.J.D. v. E.M., 467 A.2d 457, 464 (D.C. 1983) McClam v. Barry, 225, U.S. App. D.C. 124, 129, 697 F.2d 366, 371 (1983). In either case, these exceptions to the date-of-injury standard, by tolling the statute of limitations, permit a plaintiff to maintain an action from which he otherwise would have been precluded.

Against this backdrop, we review the provisions of the 1982 No-Fault Act. The Act drastically changed the circumstances under which a person could maintain an action for personal injury resulting from and automobile accident. See Monroe v. Foreman, 540 A.2d 736, 738 (D.C. 1988) Johnson v. Collins, 516 A.2d 196, 198 (D.C. 1986) Diamond v. District of Columbia 253 U.S. App. D.C. 111, 121-22, 792

F.2d 179,189-90 (1986). The Act provided:

(a) Restriction.--Except as provided in subsection (b) of this section, no person may maintain a civil action based on liability against any other person, with respect to an injury as to which personal injury protection benefits are payable under this chapter.

(b) Exceptions to restriction. - The provisions of subsection (a) of this section do not apply if:

* * * * * * *

(6) A person may be liable for any noneconomic loss if medical expenses of a victim or his or her survivors exceed $5,000, inclusive of diagnostic x-ray costs.

D.C. Code § 35-2105 (1985 Supp.). Thus in an effort to preclude suit in motor vehicle cases where an injury was not

serious, the Act provided that the right to maintain an action could not accrue unless and until the injured party's medical expenses exceeded $5,000 or one of the other exceptions had been met. To find that the statute of limitations begins to run from the date of the accident, even thought the injured party has failed to qualify under one of the exceptions permitting her to maintain an action, would preclude a class of individuals from maintaining an action, contrary to the D.C. Council's clear intention providing a civil cause of action to such class. As counsel for appellant has aptly noted, "[p]ermitting a statute of limitation to run before the plaintiff has the right to file suit defies logic." Appellant's Reply Brief at 5. Therefore, the statute of limitations should be tolled until the plain-

tiff knows, or exercising reasonable diligence, should know that her medical expenses exceed the threshold amount. See Bond v. Gallen, 503 Pa. 286, 469 A.2d 556 (1983) (adopting a similar standard under Pennsylvania's No-Fault Act).

We hold the three year statute of limitations for maintaining an action under the 1982 No-Fault Act does not begin to run until the injured party qualifies under on the six exception of § 35-2105.

We therefore reverse the trial court order and remand the case to the trial court for further proceedings consistent with this opinion.

The STATE of Colorado, and the Colorado State Patrol, a Division of the Department of Highways, Petitioners,

v.

Leigh Ann YOUNG, Respondent

No. 81SC354.

Supreme Court of Colorado.

May 23, 1983.

As Modified on Denial of Rehearings July 5, 1983

Appeal was taken from order of the District Court of Boulder County, Richard W. Dana, J., granting State's motion to dismiss claimant's action for failure to comply with notice provision of Governmental Immunity Act. The Court of Appeals 642 P2d 18, Tursi, J., reversed and remanded, and certiorari was granted. The Supreme Court, Dubofsky, J., held that claimant's notice to the State was given within 90-day notice requirement.

Affirmed and remanded with directions.

Rovira, J., dissented and filed opinion in which Lohr, J., joined.

1. States 174

The 90-day notice limitation on claim that State and State Patrol negligently misfiled traffic complaint and summons, thereby causing claimant to be wrongfully arrested on outstanding warrant, began to run not on date claimant was wrongfully arrested, but on date claimant received copy of docket sheet which noted that case was dismissed because it had been filed in wrong county, at which time reasonable opportunity for discovery of basic and material facts underlying claim arose, and therefore, notice given to State within 90 days thereafter was timely. C.R.S.1973, 24-10-109(1)

2. States 174

There must be reasonable opportunity for claimant to discover basic and material facts underlying claim before she is duty-bound to give statutory notice required for claim against public entity. C,R,S,1973,24-10-109(1).

David R. Brougham, Hall & Evans, Denver, for petitioners.

Ted L. Hansen, Rollie R. Rogers, Denver, for respondent.

DUBOFSKY, Justice.

We granted certiorari to review the judgment of the Court of Appeals in Young v. State, 642 P.2d 18 (Colo. App.1981), reversing the Boulder County District Court's dismissal of a negligence claim against the State of Colorado and the Colorado State Patrol for failure to file timely notice of a claim

under section 24-10-109(1). C.R.S. 1973 (1982 Repl. Vol. 10). We affirm.

A Colorado State Patrol officer stopped Leigh Ann Young on Interstate 25 between Castle Rock and Colorado Springs on October 9, 1977, gave her a speeding ticket, and ordered her to appear in the Douglas County Court on November 29, 1977. When Young contacted the Douglas County Court on November 28, she was informed that there were no charges pending against her. She was told the same thing the following day, and consequently did not appear in court as ordered. Unknown to Young, the summons and complaint mistakenly had been filed in the El Paso County Court instead of the Douglas County Court.

On March 1, 1978, an officer of the Lafayette Police Department stopped Young for a license plate violation.

The officer discovered through a routine radio check that a warrant had been issued for Young's arrest in El Paso County. The officer arrested Young, advised her that the arrest was based on the warrant from El Paso County, and placed her in the Lafayette City Jail before transferring her to the Boulder County Jail, wher she was searched, fingerprinted, photographed, and placed in a cell. Young was confined approximately four hours befor she was released on bond.

When released, Young was advised to appear in the El Paso County Court on March 17, 1978. On March 15, Young called the clerk of the El Paso County Court to find out the exact time of her appearance. The clerk of the court read Young the original traffice summons and advised her that the summons directed

her to appear in the Douglas County Court. Later, the El Paso County Court Clerk called Young and advised her that the case was being dismissed and that she need not appear,

On March 17, 1978, Young received a copy of the docket sheet from the El Paso County Court which noted the case was dismissed because it had been filed in the wrong county. On June 13, 1978, Young notified the defendants of her intent to file a claim against them. Young's subsequent complaint charged that the State of Colorado and the Colorado State Patrol negligently misfiled the summons and complaint in El Paso County Court, thereby causing her to be wrongfully arrested in Lafayette on the outstanding warrant.

The defendants moved to dismiss on the grounds that Young had failed to comply

with the notice provisions of section 24-10-109, C.R.S.1973, which provided in relevant part:

"(1) Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment shall file a written notice as provided in this section within 90 days after the date of the discovery of the injury....

"(2) The notice shall contain the following:

"(b) A concise statement of the basis of the claim, including the date, time, place, and circumstances of the act, omission, or event complained of;..."[1] The district court granted the motion on the ground that Young incurred and discovered her injury on March 1, 1978, the date on which she was wrongfully arrested.

Young argued that she had not discovered her injury until the receipt of the El Paso County Court docket sheet on March 17, 1978, when she first learned of the incorrect filing of the summons and complaint. The district court disagreed, finding that Young's receipt of the docket sheet only informed her of the rationale behind her March 1 arrest. The district court concluded that the 90-day notice limitation began to run on March 1, and because Young did not give notice to the defendants until June 13, her complaint was barred.

The Court of Appeals reversed, holding that the 90-day period began to run on March 17, 1978, the date Young discovered the basis of her claim. The Court of Appeals noted that section 24-10-109(2)(b),C.R.S.1973, required that the notice contain a concise statement of the basis of the claim. It concluded that logically this could not be done until both

the injury and its legal basis were perceived. 642 P.2d at 20.

Thus, the Court of Appeals determined that Young had filed timely notice of her claim under section 24-10-109(1):

"The test to be used by a trier of fact, in situations where the knowledge of the injury and the knowledge of causal factors of the injury are not simultaneously perceivable, is when the injured party discovered, or in the exercise of reasonable diligence, should have discovered the injury and its basis as a claim". Id.

The "discovery of the injury" language in section 24-10-109 incorporates a notice concept commonly employed in tort litigation. See City of Aurora v. Bechtel Corp., 599 F.2d 392 (10th Cir.1979) (cause of action for professional malpractice against an architect or engineer does not accrue until

plaintiff knew or should have known all material facts essential to show the elements of that cause of action); Exnicious v. United States, 563 F.2d 418,420(10th Cir.1977)(the two year statute of limitations under the Federal Tort Claims Act does not begin to run "until a claimant has had a reasonable opportunity to discover all of the essential elements of a possible cause of action for malpractice-damages, duty breach and causation"); Owens v. Brochner, 172 Colo. 525, 474 P.2d 603 (1974) (statute of limitations in a medical malpractice action runs from the date that a plaintiff discovers or, in the exercise of reasonable diligence, should have discovered the doctor's negligence).2 While the requirement of prompt notice serves important and particular purposes

in actions against governmental entities.3 the discovery rule does not hinder unduly the effectuation of those purposes. This is especially true where, as here, the notice period is extremely short. Moreover, as this court has recognized, the discovery rule furthers the interest of justice in not foreclosing access to a forum to an injured plaintiff who may not reasonably "understand or appreciate that actionable harm has been done him". Ownes v. Brochner, 474 P.2d at 606.

The defendants argue that this case should be controlled by Montgomery v. Polk County, 278 N.W.2d 911 (Iowa 1979). In Montgomery, the Iowa Supreme Court held that the discovery rule did not apply to cases under the Iowa Municipal Tort Claims Act, Iowa Code

§ 613A (1977). The argument is unpersuasive because the Iowa statutory provision differs from section 24-10-109 in two significant respects. First, Iowa Code § 613A.8 requires notice "within sixty days after the alleged wrongful death, loss or injury" -- it does not contain the "discovery of the injury" language of section 24-10-109. Second, in contrast to section 24-10-109(2)(b), the Iowa provision expressly relieves the claimant of the duty to provide the details which make out the basis of the claim. Iowa Code § 613A.8(1977). In light of these differences, the defendants' citation of Montgomery is inapposite.

This court found application of the discovery rule appropriate in a slightly different factual context in Brady v. City and County of Denver, 181 Colo.

218, 508 P.2d 1254 (1973). In Brady, a driver who was sued for personal injuries he caused in a collision sought indemnification from the city for Denver General Hospital's alleged negligence in aggravating the pedestrian's condition. We held that the 90-day notice required of claimants against a city by C.R.S.1963, 139-35-1(1) did not commence at the time the secondary injury actually occurred. Rather, the notice period began to run at the time the driver received knowledge of the secondary injury which was the basis of his indemnification claim. "To provide otherwise would impose an unfair burden, if not an impossible requirement, upon an alleged tort-feasor who later seeks indemnification as here. No provisions of the law should be interpreted in a way which requires an impossible task."

508 P.2d at 1256.

(1) The logic of Owens v. Brochner and Brady applies here. Young's claim that the defendants negligently misfiled the original traffic complaint and summons could not have been brought until Young discovered the alleged negligence upon receipt of the docket sheet on March 17, 1978. The district court's dismissal of Young's complaint appears to be based upon an assumption that Young's case is grounded in the intentional tort of false arrest. Such is not thecase. As Young's amended complaint sets out, she is proceeding against the State of Colorado.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on July 10, 1992, a true and correct copy of the foregoing PETITION TO THE UNITED STATES SUPREME COURT FOR WRIT OF CERTIORARI BY PETITIONER, JAMES BURKE SANTOS was placed in the U.S. mail, postage prepaid, addressed to the following:

James Bruce, Esq.
1010 Cherry Tower
950 South Cherry Street
Denver, Co 80222

James B Santos